

EXHIBIT 2

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BANXCORP,

Plaintiff,

v.

BANKRATE, INC.,

Defendant.

Civil Action No. 07-3398 (SDW)(MCA)

ORDER

July 13, 2010

WIGENTON, District Judge.

This matter, having come before the Court on Bankrate's Motion to Dismiss BanxCorp's Third Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) (the "Motion") (Doc. #91), and this Court, having carefully reviewed and considered the submissions and arguments of the parties, for the reasons stated on the record on July 13, 2010,

IT IS on this 13th Day of July, 2010,

ORDERED that Defendant Bankrate's Motion is DENIED.

s/ Susan D. Wigenton
Susan D. Wigenton, U.S.D.J.

cc: Magistrate Judge Madeline C. Arleo

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL ACTION 2:07-cv-3398-SDW

BANXCORP,	:	TRANSCRIPT OF PROCEEDINGS
Plaintiff,	:	M O T I O N
-vs-	:	Pages 1 - 16
BANKRATE, INC.	:	
Defendants.	:	

Newark, New Jersey
July 13, 2010

B E F O R E: HONORABLE SUSAN D. WIGENTION,
UNITED STATES DISTRICT JUDGE

APPPEARANCES:

CANTER LAW FIRM, P.C.
BY: NELSON E. CANTER, ESQ.
Attorney for the Plaintiff

LOWENSTEIN SANDLER KOHL FISHER & BOYLAN
BY: R. SCOTT THOMPSON, ESQ.
MICHAEL J. HAHN, ESQ.
Attorneys for the Defendant

Pursuant to Section 753 Title 28 United States Code, the following transcript is certified to be an accurate record as taken stenographically in the above entitled proceedings.

S/Carmen Liloia
CARMEN LILOIA
Certified Court Reporter
(973-477-9704)

1 THE COURT: Good morning, everyone. You can have a
2 seat in the back.

3 This is the matter of Banxcorp versus Bankrate, et al,
4 civil action number 07-3398.

5 Counsel, you may officially enter your appearances
6 please.

7 MR. CANTER: Nelson Canter, Canter Law Firm, PC, on
8 behalf of the plaintiff. I have with me the plaintiff,
9 himself, Mr. Norbert Mehl.

10 THE COURT: Very well. Good morning to you.

11 MR. THOMPSON: Good morning, your Honor. Scott
12 Thompson from Lowenstein Sandler, PC, on behalf of defendant
13 Bankrate. And with me here is my partner Michael Hahn.

14 THE COURT: Good morning to both of you as well.

15 All right, counsel. This is our, I don't know, forth
16 attempt at the complaint, and this is a third motion to
17 dismiss. So I wanted counsel to come in and give you an
18 opportunity to be heard orally to the extent you wish to be
19 heard. I have read all your submissions. I am painfully
20 familiar with the factual background of the case.

21 And with that being said, it's your motion, Mr.
22 Thompson and Mr. Hahn, and I'll hear from you.

23 MR. THOMPSON: Thank you, your Honor.

24 I am going to assume that your Honor is familiar with
25 the arguments made in our briefs and so I will try to distill

1 my argument to the essentials. But as your Honor is aware, the
2 original complaint in this case was filed three weeks -- three
3 years ago next week. And there was a little bit -- there's a
4 bit of irony that attaches to the allegation that Bankrate has
5 engaged in anti-competitive conduct because what Bankrate does
6 is essentially publish a pro-competitive series of information.
7 And from the very beginning it's been hard to really get a grip
8 on what is -- what it is that Banxcorp has been complaining
9 about. In large part because --

10 THE COURT: I know what they're complaining about,
11 that Bankrate has 95 percent of the market.

12 MR. THOMPSON: Well, I read that, your Honor.

13 THE COURT: Right.

14 MR. THOMPSON: But the question is, what's the market?
15 And ever since the very first complaint in this case, Banxcorp
16 has been either unwilling or unable to define the product
17 that's at issue here. What is it that Bankrate is selling that
18 they're dominating the market with respect to? And what are
19 the contours of the market? Those questions are absolutely
20 essential.

21 As your Honor has noted in both of the opinions, the
22 answers to those questions are absolutely essential to the
23 claims being made and to Bankrate's ability to defend against
24 those claims. Because only once we know what the product is
25 with some clarity and what the market for that product is, can

1 we then come back to the Court and show what other products can
2 substitute for that product or those products, and how it is
3 that Bankrate does not actually exercise a monopolistic
4 position within the market.

5 To this day, three years later, we still don't have a
6 clear definition of what the product is or what the market is.
7 And in fact, your Honor, in the third amended complaint in the
8 definitional sections, the very beginning of the complaint,
9 Banxcorp starts off by hopelessly muddling its definitions of
10 the product.

11 In paragraph 20, your Honor, Banxcorp starts out by
12 saying: The relevant product market for purposes of this
13 complaint is the market for -- now, here's where the punch line
14 should be, your Honor. This is where they should tell us
15 exactly what the product is. And they describe the product as:
16 Fee-based, aggregated Bankrate table listings with interactive
17 functionalities on the Internet.

18 Now, that definition, that description, to me, can be
19 one of two things. It can either be aggregated listings. That
20 is to say, Bankrate tables, which is not far off the product
21 that we started with three years ago; or it could be some
22 smaller subset of that. It could be the actual individual
23 listings on those tables, a form of advertising. It could
24 be -- but syntactically that phrase permits two different
25 interpretations. That would be confusing enough. But the

1 problem is that they then go on and they add another sentence.
2 And it says -- and the second sentence now sends us off into a
3 world where we can't possibly understand what the product is or
4 what the market is because they say: It is often referred to
5 as the "Internet-based consumer banking market place" or simply
6 Bankrate websites, and they define the term "Bankrate websites"
7 with all caps.

8 Now, that is precisely what your Honor found in your
9 September 14th opinion of last year to be hopelessly unclear.
10 It's no different from the term they used "banking market
11 places" in the last iteration of the complaint. And the
12 problem is that as you go through this complaint and you look
13 to see the way that term is used, it's used in a variety of
14 ways, depending on -- depending on what the need of Banxcorp is
15 in the particular section in which it's being used. So it's
16 not possible to tell what the product defined as Bankrate
17 websites is unless you're reading in the context of the
18 particular section.

19 When you look at, in particular, paragraphs 28 through
20 34 of the complaint, your Honor, they seem to define the
21 product as a kind of website. The whole website. That is a
22 Bankrate website. And when you look to see their definition of
23 substitutable products, it's interchangeability of use, it's
24 all about what other kinds of websites might be substituted for
25 a Bankrate website.

1 Now, the problem with that is, we don't know who the
2 consumer is of a Bankrate website. And it's the very issue
3 that your Honor has identified from the very beginning of this
4 case. Your Honor has asked Banxcorp on a number of occasions
5 to clarify it because there is no way to tell who the consumer
6 of a Bankrate website is.

7 All -- as I said before, all of the allegations
8 concerning outer boundaries of the relevant market refer to
9 this concept of the Bankrate website, but we don't -- but
10 there's no definition of who gets paid. How does Bankrate sell
11 its website? Who pays them for it?

12 THE COURT: It's a good question.

13 MR. THOMPSON: Yeah. And I don't know the answer.
14 And it's not answered in the complaint.

15 Now --

16 THE COURT: Maybe they don't know the answer.

17 MR. THOMPSON: I think that is the case. I think
18 they've had four chances. If they knew the answer, they had
19 four chances to try to give us the answer. But what we need to
20 know the answer to that question, Judge, because otherwise we
21 can't defend this case. Because we need to know: What is the
22 product? And how do we get paid for it? So that we could
23 apply the methods of antitrust law to those allegations. And
24 as things stand, we cannot apply those metrics.

25 Now, by the way, in certain instances, they, Banxcorp,

1 warps back into the product being not a Bankrate website and
2 not advertising per se, but the Bankrate tables, themselves.
3 So, for example, for purposes of their exclusive dealing claims
4 at paragraphs 280 through 284 of the third amended complaint,
5 it's plain. Banxcorp is alleging that Bankrate in some way
6 sold its Bankrate tables to media outlets. And that they
7 entered into exclusive dealings arrangements with the media
8 outlets with respect to those tables.

9 That is fundamentally -- that is a different set of
10 parameters. It is a different set of actors than what is
11 described in the balance of the complaint. And so I raise it,
12 your Honor, because what I'm -- what I'm saying is, there is
13 truly hopeless confusion still embedded in the third amended
14 complaint, despite your Honor's clear direction to Banxcorp to
15 clear up that confusion.

16 Now -- and for that reason, your Honor, every single
17 one of their claims, every single one of them is dependent upon
18 an adequate and accurate definition of both the product and the
19 product market. And so because they have failed to define the
20 product and the product market, your Honor, we, as we've set
21 forth in our papers, we believe all of the claims in the third
22 amended complaint should be dismissed.

23 I want to spend just -- I'm going to move on. I'm not
24 sure whether your Honor wants to break me up or --

25 THE COURT: I don't want to break you up.

1 MR. THOMPSON: Okay. Then I want to move on to the
2 allegations of price fixing because these allegations, if
3 they're permitted to go forward, will obviously involve a great
4 deal of expense for my client through discovery. And we think
5 that it's absolutely plain, absolutely plain --

6 THE COURT: But didn't we already go over price
7 fixing?

8 MR. THOMPSON: I'm sorry, your Honor?

20 THE COURT: All right.

21 MR. THOMPSON: -- and move on.

22 THE COURT: Okay. You know where I'm going, though?

23 MR. THOMPSON: I do believe I understand where you're
24 going.

25 THE COURT: Okay.

1 MR. THOMPSON: But the issue -- so, for starters, your
2 Honor, they have -- they never allege in the third amended
3 complaint that the media outlets were ever actually competitors
4 of Bankrate. They never allege that. What they do allege, the
5 facts that they allege, show that the media outlets were in
6 fact customers of Bankrate. That is to say there was a
7 vertical relationship between Bankrate and the media outlets.
8 And because of that vertical relationship, the per se price
9 fixing claim that's been asserted, simply doesn't apply.

10 And if that were not enough, your Honor, I maybe have
11 60 seconds left, the Supreme Court decision in Dagher is really
12 important, your Honor. And in Dagher in 2006, the Supreme
13 Court dealt squarely with the issue of whether, whether
14 entities that actually compete, that are real competitors, not
15 like the media outlets in Bankrate, but real competitors, Shell
16 Oil Company and Texico Oil Company, when they form a joint
17 venture and set a single price for their product, their
18 gasoline, whether that's price fixing. and in Dagher the
19 Supreme Court said absolutely not. That is not the kind of
20 price fixing that the antitrust laws were meant to address.

21 And so, your Honor, I just have to read from Dagher.
22 It says, the Supreme Court said: "When persons who would
23 otherwise be competitors, pool their capital and share the
24 risks of loss, as well as the opportunities for profit, such
25 joint ventures are regarded as a single firm competing with

1 other sellers in the market. As such, though there maybe price
2 fixing in a literal sense, it is not price fixing in the
3 antitrust sense."

4 So the entire antitrust, the price fixing claim that's
5 made by Banxcorp is exactly what the Supreme Court said in
6 Dagher is not per se unlawful. It has to be judged by the rule
7 of reason, if at all, and they have not asserted a rule of
8 reason claim with respect to price fixing.

9 Your Honor, I think we can -- I think we can probably
10 rely on our papers for the balance of the issues. I mean, your
11 Honor pointed out in your September opinion last year that the
12 Banxcorp has not pled antitrust injury flowing from the Lending
13 Tree conspiracy. They still haven't corrected that defect and
14 therefore --

15 THE COURT: And there's a Lending Tree action, I
16 understand, that just got filed, at least recently.

17 MR. THOMPSON: There is a new action that it got filed
18 and I think even amended to add in a kind of large scale
19 conspiracy, as I understand it. But, your Honor, I think we do
20 cover in our papers fairly comprehensively the arguments with
21 respect to the balance of the issues. And so if your Honor has
22 questions, I'd be happy to answer them or I'll sit down.

23 THE COURT: Not at you will. Very well. Thank you,
24 Mr. Thompson.

25 Mr. Canter.

1 MR. CANTER: Good morning, your Honor.

2 THE COURT: You're new to this.

3 MR. CANTER: I am, your Honor. I was substituted in
4 just a couple weeks ago, and I've had an opportunity to try to
5 digest three years of litigation.

6 THE COURT: Comprehensive is the word of the day.

7 MR. CANTER: Yes, indeed. And what I can start off by
8 saying, your Honor, is having reviewed your two previous
9 opinions, I mean, it's abundantly clear that your Honor
10 requested a more accurate definition of the product market.
11 And I respectfully submit that the third amended complaint did
12 exactly that and it went out of the -- is absolutely as
13 detailed as possible in order to convey that to you.

14 And I would submit, your Honor, the relevant market
15 for purposes of this antitrust litigation, are the Bankrate
16 websites. They are competitors. And if you look at Exhibit D
17 of the complaint, there is a list of Bankrate co-branding
18 program. Bankrate.coms on-line partners. And those on-line
19 partners are all competitors, your Honor. However, for
20 purposes of this antitrust litigation, Bankrate has entered
21 into an agreement with them to act as their exclusive agent, to
22 collect revenues, to share revenues, and to ultimately corner
23 the market.

24 So when my learned counsel indicates that the -- it's
25 muddled somehow because he thinks that the media outlets are

1 customers, then there's a -- let me just clarify that. The
2 media outlets are not customers, they're financial institutions
3 buying the advertising -- spending the advertising revenue on
4 the rate listings on a cost per click basis. Those are the
5 customers, your Honor

6 THE COURT: And if you look at the third amended
7 complaint, paragraph 22, clearly identifies who the customers
8 or the purchasers are. So I don't see there to be any
9 ambiguity whatsoever in terms of clarifying the financial
10 institutions who are the customers here.

11 With respect to consumers who are the ultimate, the
12 end users, who click on a cost per click basis, obviously if it
13 wasn't for them, there wouldn't be a Bankrate. There wouldn't
14 be a market to begin with. Just like the Coumadin scenario in
15 in Warfarin. It's pretty much identical to these
16 circumstances, except for the fact that it didn't take place on
17 the Internet. But I'm not going to address the price fixing
18 issues right now because it's my understanding that your
19 Honor's previously ruled on it, it's the law of the case. The
20 only issue really before the Court is really relevant product
21 market has been adequately pled. I respectfully submit that it
22 has. And I would respectfully submit that the Court should
23 deny the motion and we should move on to discovery. Thank you,
24 your Honor.

25 THE COURT: Very well.

1 Mr. Thompson, you want to be heard further?

2 MR. THOMPSON: Your Honor, really, I think it maybe a
3 procedural point that has some -- that really has some
4 relevance.

5 Your Honor did rule in September of last year that the
6 price fixing claim was adequately stated in the complaint. We
7 subsequently asked your Honor to reconsider that in light of
8 Dagher and certain other issues. That motion for
9 reconsideration was folded into this motion to dismiss. And so
10 just as a procedural matter I want to make sure that we're
11 not --

12 THE COURT: But that motion for reconsideration was
13 withdrawn, and then we got to this motion to dismiss because
14 they filed a third amended complaint.

19 THE COURT: You may have.

20 MR. THOMPSON: I just wanted to make sure that the
21 argument is alive. Because it really is a significant issue
22 here. It changes -- the price fixing case was not present in
23 the original complaint. And it changes the landscape of this
24 case dramatically. And we think, as we've said in our papers,
25 that there is really no valid basis for the price fixing case

1 to go forward and we hope your Honor will consider the
2 arguments that we made in our papers.

3 THE COURT: Very well.

4 Mr. Canter.

5 MR. CANTER: Your Honor, just --

6 THE COURT: Two minutes.

7 MR. CANTER: Thirty seconds?

8 THE COURT: That's even better.

9 MR. CANTER: Your Honor, with respect to the Dagher
10 case, there's no indication here that any of these entities
11 were going to share the losses, only the revenues. So that
12 case is inapplicable to our case. That's all I wanted to say.

13 THE COURT: All right.

14 Let me just state, counsel, as I said before, I mean,
15 the Court has written more than 28 pages on this case on the
16 complaint, itself. We're at the third amended complaint, which
17 is essentially plaintiff's fourth attempt to amend the
18 complaint. The complaint has grown in size and everything
19 else. But the realities of this antitrust action are that the
20 complaint is to be liberally construed. That is the reality.
21 And I do not believe, as the complaint stands now, the third
22 amended complaint, that defendants are put in a position where
23 they cannot answer the complaint. I do believe it is
24 adequately pled, given all reasonable inferences to the
25 plaintiffs in this matter. Discovery is going to bear some

1 things out, obviously, the complaint has changed in some
2 aspects. It will continue to change, quite honestly, in some
3 aspects as discovery proceeds. There are certain claims that
4 are not going to survive. And, quite honestly, I don't know if
5 there's going to be additional claims that potentially maybe
6 sought to be amended and rolled into the complaint, I don't
7 know. But at this juncture what the Court has before it is
8 whether, and this has been the Court's issue all along, was the
9 relevant market adequately defined and clear in the complaint?
10 And, quite honestly, I think it is at this point. Now, could
11 it be clearer? Sure. But, you know, I don't think we need a
12 fifth attempt to do that. **I think it's certainly sufficiently**
13 **pled as it relates to the price fixing claim.** **As I said**
14 **before, this is a pleadings issue at this point.** **The Court is**
15 **not going to delve into the arguments that would be appropriate**
16 **for summary judgment purposes at this juncture.** This a
17 pleadings stage. The pleadings are sufficient and adequate and
18 the discovery should proceed. I know you've been doing some
19 discovery, but the discovery should proceed. **I want to tell**
20 **counsel, do not file a motion for reconsideration.** We're done.
21 We're moving on from the complaint stage at this point. You
22 can file your answers as they are appropriate, and I will sign
23 the appropriate order and we will proceed from there.

24 MR. CANTER: Thank you, your Honor.

25 THE COURT: Anything further?

1 MR. CANTER: I just want to schedule a Rule 26
2 conference.

3 THE COURT: Judge Arleo will do that. I will
4 certainly notify her of what we've done here today. I'll file
5 the appropriate order as well, but I'll notify her that counsel
6 is ready to proceed with the conference.

7 MR. CANTER: Thank you, your Honor.

8 THE COURT: Okay? Counsel, have a great day.

9 MR. CANTER: You too, your Honor.

10 THE COURT: Thank you.

11 MR. THOMPSON: Thank you.

12 (Matter concluded)

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